As Delivered

United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada

(WT/DS236)

Oral Statement of the United States of America at the Second Meeting of the Panel

June 4, 2002

1. Thank you, Mr. Chairman, and members of the Panel. The United States appreciates the opportunity once again to present its views on the issues in this dispute. At this meeting, the United States will review some of the main issues, focusing on the most recent submissions by the parties. I will first address key issues relating to the proper interpretation of the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). I will then address certain aspects of the factual record that was the basis for the Preliminary Determination.

Financial Contribution

2. We begin with the Commerce Department's finding of a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Canada has not contested the fact that the provincial governments identify specific stands of timber and enter into tenure agreements that allow companies to harvest that timber, that is, to take the timber off the land, in exchange for a fee based on the volume of timber harvested. It should therefore be beyond dispute that the provincial governments, through the actions of granting those tenures, are under any definition providing a good within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

3. Canada's attempts to argue to the contrary defy general principles of treaty interpretation, the rules of logic and common sense. The essence of Canada's argument is that when the

provincial governments grant companies, such as lumber producers, the right to take timber from government land, the companies actually provide *themselves* with a good when they cut down a tree.[1] To support this rather extraordinary proposition, Canada ignores the ordinary meaning of "goods," which includes things to be severed from the land, such as timber. Canada then invents an arbitrary distinction under which standing trees are not goods; only cut trees (i.e., logs) are goods. Canada insists that tenure holders do not pay for trees. In Canada's view, therefore, a government can identify a whole forest of trees and give a specific lumber company the right to take those trees for free. As long as the government does not physically cut down the trees, there is no subsidy. The violence such a theory does to the subsidy disciplines is obvious.

4. Under any rational analysis that respects the principles of treaty interpretation, the inescapable conclusion is that when a government gives a company the right to take an identified good, whether it is the right to take widgets from a government warehouse or trees from government land, the government is "providing" goods within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. This straightforward interpretation of the Agreement does not render all government action a potential financial contribution, as Canada suggests. Canada's fictitious doomsday scenario is a diversion – a diversion from the fact that the interpretation proposed by Canada would render Article 1.1(a)(1)(iii) virtually meaningless, thereby undermining the subsidy disciplines established under the SCM Agreement.

5. Canada's strained interpretation is not supported by the text of the SCM Agreement. Based on the ordinary meaning of the terms of the SCM Agreement, when the provincial

[1] *See* Canada Second Written Submission, para. 16.

governments grant companies the right to take an identified good – timber – from government land, the government makes a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the Agreement.

Benefit

6. As a result of that financial contribution there must, of course, be a benefit. It is now well settled that a financial contribution confers a benefit if it provides some form of artificial advantage that would not otherwise be available in the marketplace absent the government's financial contribution. As Canada points out, there is no dispute that, under the guidelines in Article 14(d), the benefit from a government's provision of goods is to be determined in relation to the prevailing market conditions for the good in the country of provision. However, Canada and the United States have starkly contrasting views on what constitutes prevailing market conditions in a given country.

7. The United States shares the view of the European Communities that the concept of "prevailing market conditions in the country of provision" is sufficiently broad to permit consideration of prices for competitive goods commercially available on the world markets to purchasers in the country of provision.

8. That interpretation is firmly grounded in the text of the SCM Agreement and commercial reality. "Commercially available," as defined in the SCM Agreement, means that the choice between domestic and imported goods is unrestricted and depends solely on commercial considerations.[2] Thus, for commercially available goods, political borders are, by definition,

[2] SCM Agreement, Annex I, fn. 57.

meaningless. Commercially available goods, both imported and domestic, compete in the domestic market and together constitute the supply available to purchasers in the country of provision, that is, goods that the purchasers could obtain in the market absent the government's financial contribution.

9. In today's world, any thorough economic analysis of the prevailing market conditions for a particular good in any given country would necessarily have to take into account the availability of comparable imports. The importance of imports to conditions in a given market, particularly prices, is also evident from the SCM Agreement itself, which provides a remedy for injury caused by subsidized imports. If imports were not an integral part of the market within a given country, we would not be here today.

10. In Canada's view of the world, for purposes of this dispute at least, each country's market is hermetically sealed and populated solely by resident buyers and sellers. If border effects were as Canada suggests, globalization and world trade, which are a modern reality, would not be possible.

11. Outside the context of this dispute Canada's view of the world appears to be broader and more realistic. Canada has acknowledged that the concept of "prevailing market conditions" in the country of provision includes the available supply and that imports, which are part of the available supply, can, in appropriate circumstances, provide a market benchmark consistent with Article 14(d).[3] Even under Canada's reading of Article 14(d), therefore, prices for competitive goods commercially available on world markets fall within the universe of potential market

[3] *See* Canada First Response to Panel Questions, paras. 26, 30.

benchmarks in certain cases. In reaching that conclusion, neither Canada, the European Communities, nor the United States is reading "in the country" to mean "out of the country" or the reverse.

12. Because prices for competitive goods commercially available on world markets fall within the ordinary meaning of the terms used in Article 14(d), there is no basis to interpret that provision as precluding the use of such prices, under any circumstances.

13. The United States agrees that, in most cases, it may be preferable to use prices between buyers and sellers in the country of provision. The circumstances under which the use of such prices is not possible should be, and in the United States' experience have been, rare. For example, it appears to be undisputed that a government monopoly for the good in question would present such a situation. It is the view of the United States, however, that other situations may exist as well. Each case must be examined on its facts.

14. Canada argues, in effect, that "*market*" conditions does not mean conditions established by forces of the market, but rather means the market such as the government chooses to create it, shape it and control it. Thus, in Canada's view, if a government effectively controls the market for a particular good that is just the reality of that market and, therefore, it is impossible to find a subsidy. Prior panels and the Appellate Body disagree.

15. As the Canada Aircraft panel stated, the purpose of a benefit analysis is to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case *but for* the financial contribution. Likewise, the Appellate Body has stated that the analysis is to determine whether the recipient is better off than it would otherwise

have been *absent the financial contribution*. Private prices for a good that are driven by government prices for that good do not represent prices that would otherwise have been available in the market *absent* the government financial contribution. The Commerce Department's preliminary investigation indicates that such is the case with respect to private stumpage prices in Canada.

16. In the preliminary investigation, Commerce found that the provincial governments control approximately 90 percent of the softwood timber supply. Moreover, tenure holders consistently harvest less than their annual allowable cut or ("AAC") and, if necessary, a tenure holder may harvest in excess of its AAC. Canada does not dispute these facts. These undisputed facts indicate that Canadian lumber producers would have no incentive to purchase private stumpage unless the private seller was willing to meet, or better, the government's administratively set stumpage price.

17. That conclusion was confirmed by other evidence on the record indicating that private stumpage prices in Canada are driven by the overwhelming supply of Crown timber. Thus, the record facts, when taken as a whole, support the Commerce Department's conclusion that private stumpage prices in Canada are integrally linked to the government prices and therefore could not logically serve as a benchmark. That conclusion was not based on a desire to seek a perfectly undistorted market, but rather on the obvious need for a legitimate market benchmark, consistent with the guidelines in Article 14(d).

18. Stumpage prices in contiguous U.S. states were the most logical choice. U.S. stumpage is commercially available to Canadian producers and the contiguous forests are generally

comparable. The United States is the only country from which Canada obtains significant amounts of softwood timber. Canadian companies own timberland in the United States, bid on U.S. stumpage and regularly import U.S. timber. Moreover, the markets of the United States and Canada, partners in the North American Free Trade Agreement, are highly integrated. Finally, Canada does not enjoy any artificial advantage in timber. The United States and Canada have approximately the same volume of available timber of similar species. If Canada has any advantage, it is the availability of more old growth timber. The Canadian old growth timber should, under normal market conditions, command *higher* prices than the predominantly new growth timber in the United States. The Commerce Department's decision to use U.S. stumpage prices in contiguous U.S. states was, therefore, a reasonable, logical choice with a sound factual basis.

19. In sum, the Panel should find that Article 14(d) permits the use of prices commercially available on world markets in appropriate circumstances. The Panel should also find that the Commerce Department's decision to use such a benchmark was appropriate under the specific facts of this case.

Critical Circumstances

20. I will turn now to the preliminary critical circumstances determination. Canada argues in its second submission that, if the United States wishes to preserve the possibility of retroactively imposing definitive countervailing duties pursuant to a critical circumstances determination, it should simply provide in its laws for retroactive assessment. That is, however, precisely what suspension of liquidation does. Once again, Canada elevates form over substance. As the United

States has previously explained, suspension of liquidation is merely a legal status indicating that the final liability for all duties owed on the suspended entries has not yet been determined. Passing another law that would provide for retroactive assessment would have precisely the same legal effect, that is, it would hold open the question of final liability for duties. The new law would merely give a different name to the same legal status.

21. Furthermore, Canada's assertion that U.S. Customs' practice resolves this issue is incorrect. The only way to legally guarantee that an entry will not be liquidated is to suspend liquidation. Under U.S. law, an entry that is not liquidated within one year from the date of entry is deemed liquidated by operation of law at the rate of duty in effect at the time of entry (although Customs may extend the one-year period in certain limited circumstances, those circumstances do not include a potential finding of critical circumstances).[4] Countervailing duty investigations frequently take more than a year to complete; the SCM Agreement permits the investigation to go as long as 18 months.[5] Entries during the 90-day retroactivity period would, in such cases, be liquidated by operation of law before the investigation is completed and no retroactive countervailing duties could be imposed. The only means to prevent the entries liquidating by operation of law is through a suspension of liquidation imposed by statute or court order.[6]

22. The United States also notes that Canada's flexible interpretation of Article 20.3 stands in stark contrast to its overly restrictive reading of Article 20.1. The United States therefore takes

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[4] *See* 19 U.S.C. § 1504(a) (Exhibit U.S.-53); 19 C.F.R. § 159.11 (Exhibit CDA-59). *See also* 19 C.F.R. § 159.12(a)(1) (Exhibit CDA-59).

[5] *See* SCM Agreement, Article 11.11.

[6] *See* 19 C.F.R. § 159.12(a)(2) (Exhibit CDA-59).

little comfort in Canada's assertion that Article 20.3, which on its face does not contain the limitations assumed by Canada, would not be interpreted as precluding the imposition of retroactive duties where the amount of the duties has not been guaranteed by cash deposit or bond.[7]

Expedited Reviews

23. The United States is also troubled by Canada's latest submission on expedited reviews. The United States has, in fact, demonstrated that U.S. law provides the Commerce Department with ample discretion under section 751 of the statute to implement the United States' obligations under Article 19.3. Canada argues, however, that *it* is still not convinced and makes the unsubtantiated claim that the Commerce Department in accepting requests for expedited reviews is acting *ultra vires*. Canada therefore asks the Panel to find "for the sake of clarity" that the United States has failed to implement its obligations under the SCM Agreement.[8]

24. Canada is not, however, adjudicating this dispute. It is therefore not Canada that must be convinced. Moreover, not only does Canada ask the Panel to find a WTO inconsistency where none exists, Canada even goes so far as to ask the Panel to make findings that the United States must implement its obligations in a specific fashion, not just in this case, but "in any other investigation."[9] Such a request is, to say the least, inappropriate.

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[7] *See* Canada Second Written Submission, para. 91.

[8] *Id*. at para. 95.

[9] *Id.*

25. Where a Member's laws do not mandate WTO-inconsistent action, the Member is accorded the presumption that it will implement its obligations in good faith. Canada's attempt to reverse that presumption in this case runs contrary to established WTO jurisprudence and raises serious institutional concerns.[10]

26. The United States has demonstrated that the provisions of its laws and regulations at issue do not mandate WTO inconsistent action or preclude the Commerce Department from implementing the obligations in Article 19.3 of the SCM Agreement. Therefore, the measures are not inconsistent with the SCM Agreement. No further findings or recommendations are necessary or appropriate. A general finding that future actions – *if* they should ever be taken by the United States – are inconsistent with the SCM Agreement would constitute an interpretation of the SCM Agreement that would improperly go well beyond the boundaries of the existing dispute.[11] Not only would it be outside the terms of reference of this dispute, but the power to interpret the agreements is reserved to the Ministerial Conference and the General Council.[12]

27. The United States would also note that Canada has misstated the United States' position with respect to administrative reviews. Canada notes that the United States stated that Section

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[10] *See Chile - Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, Report of the Appellate Body, adopted 12 January 2000, para. 74 (cautioning against presumptions that a Member will act in bad faith).

[11] *See United States - Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, Report of the Appellate Body, adopted 10 January 2001, para. 92 ("[I]t is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations.") The Appellate Body's admonition applies with equal force to the SCM Agreement.

[12] Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization*.

351.213(b) of the Commerce Department's regulations does not apply to aggregate cases.[13] Canada fails to note, however, that the United States also stated that the regulation does not restrict the Commerce Department's authority to conduct reviews.[14] More importantly, however, the regulations cited by Canada govern only assessment proceedings and, as discussed in the United States' prior submissions, Article 21.2 does not address assessment proceedings. There is therefore no basis for Canada's claim. In particular, I would like to make a comment on Canada's argument with regard to Article 21.2. There are two distinct inquiries, one is reviews to determine whether continued imposition of the duty is necessary to offset subsidization, which is the responsibility of the Commerce Department. The other type of inquiry is to determine whether injury is likely to recur, which is within the purview of the International Trade Commission and is not governed by the Commerce Department regulations.

Factual Support for the Preliminary Determination

28. The United States will now turn to the factual record before the Commerce Department at the time of the Preliminary Determination. That information consists largely of the information that Canada submitted in its initial responses to the Commerce Department's questionnaire. The United States has provided the Panel with a great deal of that information in its prior submissions, particularly in response to the questions from the Panel. The United States has not merely characterized what Canada has said; it has provided copies of the actual documents that Canada submitted. We have been extremely forthcoming. The United States therefore finds very

[13] *See* Canada Second Written Submission, para. 99.

[14] *See* U.S. First Response to Panel Questions, para. 63.

disturbing Canada's serious and entirely baseless accusation that the United States has wilfully misrepresented certain facts concerning tenures in Alberta.[15] In a moment, we will briefly discuss those facts. The documents provided by the United States, however, speak for themselves.

29. Canada also argues at length in its second submission about the Commerce Department's preliminary adjustments for species, quality, tenure obligations, etc. Although the United States could refute those claims, they are not before the Panel for the simple reason that Canada has not challenged those adjustments in this proceeding. The mere fact that, in response to a question from the Panel, the United States provided a record document confirming that adjustments were made does not open the door for Canada to assert new claims. Canada's eleventh hour attempt to essentially expand the Panel's terms of reference is improper and should, therefore, be rejected.

30. The United States further notes, however, that in asserting these claims Canada attempts to leave the Panel with the impression that the Commerce Department arbitrarily reduced costs reported by the provinces when calculating adjustments. For example, Canada cites in its second submission to data in a KPMG study on in-kind costs in Ontario and criticizes the Commerce Department for failing to use that data in the Preliminary Determination. What Canada fails to state, however, is that the data the Commerce Department did use in the Preliminary Determination is, in fact, the in-kind cost data *actually reported by Ontario* in its questionnaire response. Perhaps Canada should direct its criticism to Ontario. I note this example to underscore the inappropriateness of addressing these new claims at this stage of the proceeding,

[15] *See* Canada Second Written Submission, para. 23.

and how doing so would prejudice the United States' right to defend against these claims and the rights of potential third party Members.

31. Moreover, Canada cites its criticisms of the Commerce Department's tenure cost adjustments in an attempt to bolster its argument that the use of a cross-border comparison is prohibited *per se*. In doing so, Canada attempts to give the impression that the study relied upon by Canada to support this argument is the only record evidence on this issue. In fact, the record at the time of the Preliminary Determination contains extensive evidence, not cited by Canada, that the U.S. stumpage prices in contiguous states provide a very reasonable and logical basis for determining the market value of Canadian timber. There is, for example, an extensive study by forestry experts on the record that addresses the problems with using private prices in Canada as a benchmark, supports the use of a cross-border comparison generally and addresses the specific criticisms raised by Canada concerning necessary tenure cost adjustments.[16] Thus, while it is the position of the United States that the specific adjustments made in this case are not before the Panel, the United States would be happy to provide a copy of the study to the Panel if the Panel would like to review it in connection with the general issue of cross border benchmarks.

32. Canada also accuses the United States of engaging in post hoc rationalizations. The United States notes that Canada makes this accusation most fervently with respect to the pass-through issue, which Canada first raised in the underlying investigation in a submission made

[16] David Cox, Jack Lutz and William McKillop, "Examining Market Value of Public Softwood Sawtimber in Canada" (July 27, 2001).

one day before the Preliminary Determination.[17] It is also noteworthy that Canada has not claimed that the Commerce Department's Preliminary Determination is inconsistent with the requirements of Article 22 of the SCM Agreement regarding public notice and explanation of determinations.

33. Canada's accusations amount to no more than innuendo and an attempt to divert the Panel's attention from the real issues and the actual facts on the record. We have a saying in the United States: "If the law is on your side, pound on the law. If the facts are on your side, pound on the facts. If neither the law nor the facts are on your side, pound on the table."

34. The United States would now like to turn the Panel's attention to certain record facts before the Commerce Department at the time of the Preliminary Determination. The debate over the record facts has primarily centered on two issues: processing requirements imposed on tenure holders by the provincial governments and private stumpage prices in Canada. The United States will briefly review those facts to aid the Panel and to respond to Canada's accusations.

Processing Requirements - Independent Loggers

35. With respect to tenure processing requirements and the existence of so-called independent loggers, the United States would stress at the outset that the Commerce Department's benefit calculation was based solely on the volume of Crown timber that went into the production of softwood lumber. Thus, the relevant issue here is what portion of the *volume* of *Crown* timber going into the production of softwood lumber is covered by specific tenure

[17] *See* Canada First Oral Statement, para. 47, fn. 17, citing submission dated August 8, 2001. The Preliminary Determination was issued August 9, 2001.

types, and the processing conditions imposed on those tenures. Data pertaining to other tenure types, to timber from private lands or to timber going to the production of other types of products are entirely irrelevant because it has no bearing on the Commerce Department's calculation. Canada's citations to such data, therefore, only serve to confuse the issue.

36. I will begin by reviewing the facts pertaining to Alberta, which Canada alleges the United States has wilfully misrepresented. In its response to the Panel's questions, the United States noted that Alberta stated in its questionnaire response that "[a]ll forms of commercial tenure own and operate sawmills."[18] That is a direct quote from the questionnaire response. Moreover, Alberta submitted to the Commerce Department a sample tenure contract for the dominant form of tenure. The sample tenure contract was with a mill owner. Canada claims, however, that the remainder of Alberta's response demonstrates that many tenure holders are not sawmills. So, we double-checked the response. Canada obviously did not.

37. The United States refers the Panel to Exhibit U.S.-54, which we provided today, which is derived from Alberta's questionnaire response. (The United States notes that Exhibit U.S.-54 is drawn from proprietary information, which we cannot disclose without consent. If Canada provides consent, the United States would be pleased to provide the underlying data to the Panel.) What that data shows, as summarized in the exhibit, is that all of the 155 tenure holders in Alberta own a processing facility and of the 155, 143 own a sawmill. The record also indicates that approximately 95 percent of the Crown softwood harvest in Alberta goes directly to

[18] U.S. First Response to Panel Questions, para. 6.

those sawmills.[19] That is not accusation or innuendo, that is fact. The United States is confident that, upon reviewing the exhibits, the Panel will agree that the information on the record for the Preliminary Determination demonstrates that the vast majority of the Crown timber going into the production of lumber in Alberta is provided by the provinces directly to the mills.

38. For British Columbia ("B.C."), the record demonstrates that 83 percent of the Crown harvest is covered by four tenure types that *require* the holder to process the timber in a facility, such as a lumber mill, owned by the tenure holder. Canada does not contest that fact. Canada merely states that B.C. does not require tenure holders to "build a sawmill" and that the term "timber processing facilities" includes more than lumber mills. It is irrelevant that tenure holders are not required to *build* a sawmill. What is relevant is that they are required to *own* such a facility. Furthermore, as noted previously, only facilities producing the subject merchandise are relevant to the Commerce Department's benefit calculation. The fact that other types of facilities also own tenures is irrelevant. The fact remains that the vast majority of the Crown timber that went into lumber production in B.C. was provided directly by the province to the mill, not by independent loggers.

39. With regard to Quebec, the record demonstrates that 99 percent of the Crown harvest goes to entities that have Timber Supply and Forest Management Agreements, which *require* the tenure holder to process the timber in its own facility. Canada does not deny that fact. Canada merely notes that Forest Management Contracts, which cover the remaining 1 percent of the Crown harvest, do not have such a restriction. This means that no more than 1 percent of the

[19] *See* Exhibit U.S.-54.

Crown timber used for lumber production in Quebec could possibly have been provided by independent loggers. The other 99 percent was provided by the province directly to the sawmills.

40. Similarly, Canada does not contest Ontario's statement that the tenure holders generally must own a timber processing facility or have a contract to supply such a facility. Canada merely notes that Ontario grants licenses to export logs. Log exports have absolutely nothing to do with the volume of the Crown harvest going into the production of lumber and are therefore entirely irrelevant to the benefit calculation. In any event, log exports account for less than 1 percent of the Crown harvest in Ontario.

41. Finally, Canada does not appear to contest the fact that in Manitoba and Saskatchewan, at least 95 percent and 86 percent, respectively, of the Crown timber used for softwood lumber production was provided directly to the mills by the province.

42. Thus, when the rhetoric is ignored and the *relevant* facts are allowed to speak for themselves, the record at the time of the Preliminary Determination indicates that the vast majority of Crown timber obtained by lumber producers was provided by the provinces directly to those producers. Moreover, as explained in the United States' response to the Panel's questions, the record also indicates that, due to the restrictions imposed by the provinces, any truly arm's-length transactions for the small amount of timber that a lumber producer may have acquired outside its own tenure are, at best, insignificant. In short, the record at the time of the Preliminary Determination does not indicate that pass-through is an issue, nor did Canada raise it as an issue until the day before the Preliminary Determination.

Private Prices

43. With respect to private stumpage prices, Canada attempts to argue around the fact that only three provinces provided any information concerning non-government prices for stumpage. Canada also continues to accuse the United States of not even considering evidence of private prices despite the fact that this evidence was discussed in the notice of Preliminary Determination, showing that this is another baseless accusation. With respect to Alberta, Canada again insinuates that the United States is attempting to hide the facts. Canada's more detailed description of Alberta's response, however, adds nothing. The fact remains that Alberta provided a single estimated stumpage value for all species and quality of trees; a value that is calculated by the province for the purpose of settling disputes over damaged timber.

44. The United States provided the Panel with a copy of the Resource Information Systems study,[20] which Ontario submitted to the Commerce Department. The United States has explained in prior submissions why it found the study inadequate for establishing a benchmark and I will not repeat those points. However, I refer the Panel to the United States' previous comments on the study and to the study itself, which we believe confirm the validity of the Commerce Department's assessment.

45. With respect to Quebec, the United States notes that the record evidence of suppression of private stumpage prices that the United States has cited is only a sample of the record evidence. Canada argues that one piece of evidence cited by the United States, the doctoral thesis by Luc Parent, was based on an outdated study rejected by the Commerce Department in

[20] *See* Exhibit U.S.-32; *see also* U.S. First Response to Panel Questions, paras. 33-34.

Lumber III. Canada fails to mention, however, that Parent's thesis relied on numerous other sources published after *Lumber III*. Mr. Parent concluded that "the timber markets do not allow the small producer to obtain a sufficient price for its products;"[21] that "[t]he public forest being able to respond to the large majority of the needs of the industrials, the [industrials have] little interest in the development of the small private forest;"[22] and that "the influence of the government in the determination of the prices can hardly be qualified as neutral."[23]

46. Moreover, as discussed previously, this was not the only evidence on the record. Other facts concerning the governments' position as the dominant supplier of timber are consistent with the various statements on the record concerning price suppression. Evidence is cumulative. All of the evidence of the dominant influence of the provincial government on private stumpage prices, taken together, is more than sufficient to support the Commerce Department's preliminary determination that private prices could not logically serve as a valid market benchmark.

47. In sum, the record information on non-government stumpage prices was extremely limited and provided an inadequate basis for establishing market benchmarks.

Standard of Review

48. Having reviewed the record facts, it is now appropriate to take a step back and consider them in the context of the standard of review and the burden of proof. This is particularly

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[21] Luc Parent, "A Financial Strategy for the Development of Private Timber Lands in Quebec" at 83 (translated) (June 1995), contained in Petition, Exhibit IV G-6 (Exhibit U.S.-33).

[22] *Id.* at 87.

[23] *Id.*

important in this case because it involves a preliminary determination – a stage in an investigation at which the issues of fact have not been fully developed, clarified or understood.

49. As previous panels have recognized, what constitutes sufficient evidence to support a determination varies depending on the nature of the determination in question. Canada argues this case as if the determination at issue were the final determination. But, the only matter before the Panel is the Preliminary Determination. At the time of the Preliminary Determination the investigation was, of course, incomplete. In the final stages of the investigation, the Commerce Department issued additional questionnaires, collected additional information, conducted a verification, received written argument and conducted a public hearing. During that process, many of the issues Canada has raised before this Panel, such as the selection of benchmarks, were further examined and debated.

50. Canada appears to be asking the Panel to resolve all these outstanding issues and render its own findings of fact. Accordingly, Canada has spent a great deal of time explaining the facts and statements it provided to the Commerce Department prior to the Preliminary Determination and even supplementing those facts with references to evidence submitted *after* the Preliminary Determination. The proper time and place to explain, clarify and supplement the facts, however, is before the Commerce Department in the final stages of the investigation. In this proceeding before the Panel, the preliminary record must speak for itself.

51. It is well established that it is not the role of a panel to conduct a *de novo* review. If a panel were to do so it would be stepping out of its role as adjudicator and effectively usurping the

role of the investigating authority. It is particularly difficult, but important, to guard against blurring the role of adjudicator and investigator in reviewing a preliminary determination.

52. The question in this proceeding is whether Canada has established, based on the evidence before the Commerce Department at the time of the Preliminary Determination, that there is a breach of the cited WTO provisions.[24] If there is a reasonable basis for the preliminary determination, as there is in this case, there can be no breach of the SCM Agreement. It is important to bear in mind that Canada, as the complainant, bears the burden of coming forward with evidence and argument that establish a *prima facie* case of a breach.[25] Therefore, if the balance of evidence is inconclusive with respect to a particular claim, Canada must be held to have failed to establish that claim.[26]

53. It is the view of the United States that an objective assessment of this matter, as presented here and in our prior submissions, and a proper application of the standard of review will lead the Panel to conclude that Canada has not established a breach of the cited WTO provisions.

Conclusion

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[24] *See United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, as affirmed by the Appellate Body, adopted 23 August 2001, para. 7.153; *see also*, *United States - Measures Affecting Import of Softwood Lumber from Canada, SCM/162, BISD40S/358*, adopted 27 October 1993, paras. 332, 335.

[25] *See, e.g., United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, p. 14; *European Communities - Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, adopted 13 February 1998, para. 104.

[26] *See, e.g., India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, Report of the Panel, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

54. That concludes the United States' oral statement. The United States appreciates the time and effort the Panel has devoted to resolving this dispute and welcomes any questions the Panel may have.